IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No 25 of 1998

in

COMPANY APPLICATIONNo 47 of 1998

GUJARAT FINANCIAL SERVICES LTD

Versus

HYNOUP FOODS & OIL INDUSTRIES LTD.

Appearance:

MR BR GUPTA for Petitioner

CORAM : MR.JUSTICE Y.B.BHATT and
MR.JUSTICE R.P.DHOLAKIA

Date of decision: 18/06/98

ORAL ORDER

The appellant herein is the original petitioning creditor who had filed a petition for winding up of the respondent-Company. Admittedly, the parties had settled their dispute amicably, had arrived at consent terms in writing and the same were placed before the learned Company Judge hearing the winding up petition. On the parties to the winding up petition filing such consent terms, the then Company Judge disposed of the winding up petition by his order dated 12th of August, 1997. In substance, the order merely recites that in view of consent terms entered into between the parties, the petitioner does not press for the petition at this stage, etc. and that "petition is dismissed as withdrawn".

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#. It is an admitted fact that these consent terms impose reciprocal obligations on the parties and also confer reciprocal rights. It is also an admitted fact that the first instalment due under the consent terms on 14th of August, 1997 was paid and that the next instalment due on 14th of September, 1997 was not paid. In view of this situation, the petitioning creditor (present appellant) filed a company application before

the learned Company Judge for revival of the Original Company Petition No.241 of 1996 (for winding up of the respondent Company). The said application for revival of the winding up petition also contained an alternative prayer that a decree in accordance with the consent terms be passed under the provisions of Order 23 Rule 3 of Civil Procedure Code. The learned Company Judge after hearing the parties, passed an order rejecting both the prayers, and it is this order which is the subject matter of the present appeal.

#. The learned Company Judge has recorded a finding of fact that although the appellant-original petitioner has complained of a breach of the consent terms on the part of the respondent, it is itself in breach of the consent terms, and that it is the appellant-petitioning creditor who has first committed the breach. Under the circumstances, a party to consent terms who has first committed the breach cannot then complain of a breach subsequently committed by the applicant. This finding of fact could not be assailed by the learned counsel for the appellant on the basis of any material on record. Only an oral explanation was sought to be tendered without any supporting material whatsoever. In short, although the appellant complained that the respondent failed to pay the second instalment due on 14th of September, 1997, the appellant could not demonstratively show that it was incapable of withdrawing the criminal proceedings which it had undertaken to withdraw under the consent terms. In this context, it was submitted that there were two criminal proceedings pending filed by the appellant-petitioner against the respondent out of which one was withdrawn but the other could not be withdrawn for various reasons. One of such reasons suggested orally is that the second criminal proceeding was not placed on the board of the Judicial Magistrate before the second instalment became due, and that therefore, the appellant could not withdraw the same. Firstly, this is merely an oral explanation without any supporting material, and even otherwise this explanation is not satisfactory. It does not require any judicial insight to conclude that if a complainant in a private complaint wishes to withdraw the prosecution, the opponent in such a prosecution namely, the accused is bound to cooperate, and on a joint request of the parties concerned, no Criminal Court would reasonably refuse to take up a matter on the board for permitting a withdrawal thereof. In any case, it is an admitted fact that no such attempt was made. Thus, the basic finding of fact recorded by the learned Judge that it was the appellant-petitioner creditor who was chronologically the first defaulter in

complying with its obligations under the consent terms, is a finding which we must confirm.

#. The other contention sought to be raised arises from the alternate prayer made by the appellant in the application for revival of the winding up petition.

4.1 In this context, learned advocate for the appellant submits that the learned Company Judge while entertaining the revival application and as part of the revival proceedings, ought to have directed a decree to be drawn up in accordance with Order 23 Rule 3 of Civil Procedure Code. In this context, we may note that the learned Company Judge has rejected the prayer without going into extensive reasons therefore. However, since we have heard learned counsel for the appellant at length on this contention, we find that such a request cannot be granted on merits.

#. The learned counsel for the appellant seeks to resort to the provisions of Order 23 Rule 3 of Civil Procedure Code. Even a casual perusal of Rule 3 indicates that the same opens with the phrase "where it is proved to the satisfaction of the Court that a suit has been adjusted fully or in part ...". Obviously, this provision would not apply to the facts of the case, even assuming in law that it would apply to consent terms filed in winding up proceedings under the Companies Act. This is so for the simple reason that the learned Company Judge while disposing of the winding up petition has firstly not taken judicial cognizance of the consent terms. He has merely recorded the statement made by the learned counsel for the petitioner that "since the filing of the petition, the respondents have entered into an agreement with the petitioner for satisfactory discharge of his debt...", and that said consent terms have been placed on record. The learned Company Judge then merely observed that "in view thereof that the petitioner does not press for the petition at this stage, the petition is dismissed as withdrawn...". Thus, we find that the essential condition of application of Rule 3, namely, the settlement or adjustment of a suit fully or in part, etc. "proved to the satisfaction of the Court" is blatantly lacking in the instant case. Even on a plain reading of the order passed by the learned Company Judge, it becomes apparent that the learned Company Judge has not in the slightest manner applied his mind to the contents of the consent terms, and that, therefore, there was no question at all nor any scope to record any such satisfaction, let alone satisfaction based on sufficient proof.

5.1 It was then sought to be urged by the learned counsel for the appellant that even at the subsequent stage when the appellant's application for revival of the winding up petition was being heard, a decree could and should have been drawn up. This submission too is not based on any substantial right arising from any statute. In this context, we also observe that in contrast to consent terms which are carefully drafted out particularly in cases where parties have created mutual and corresponding rights and obligations, the consent terms in question do not contain any clause requesting or requiring the Court to draw up a decree in terms of consent terms. Had there been such a clause in the consent terms, it might perhaps have been open to the appellant to urge that the non-drawing up of a decree was a mere ministerial error which can be corrected, without specific judicial orders in that behalf. However, since such a clause is conspicuously absent, we cannot accept the contention that a decree should have been drawn up by the registry as being a more or less ministerial function, and that a decree in terms of consent terms ought to have been drawn up although no direction in that behalf was contained in the order of the learned company Judge.

5.2 We also note that the earlier order of the learned Company Judge under which the winding up petition was dismissed as withdrawn, does not contain nor record nor observe nor deals with any request of the appellant petitioning creditor that a decree be passed in terms of consent terms. Had that request been made at that stage, perhaps that request could have been simply granted with the consent of the respondent or a suitable clause could have been inserted in the consent terms itself. However, since at that stage neither of these two courses were resorted to, the appellants herein is compelled to resort to technicalities, without any support from facts or equity in his favour.

#. We also note, while remaining conscious that this aspect has no direct bearing on the facts or on the law, that even before the learned Company Judge where the appellant's application for revival of the Company Petition was being heard, the appellant refused to enter into a dialogue with respondent for renegotiating the consent terms. As aforesaid, we are conscious that it has no bearing on the legal issues involved, yet we cannot but express regret at this attitude of the appellant.

#. In the premises aforesaid, there is no substance

in the present appeal, and the same is therefore dismissed. Notices discharged with no orders as to costs.

FURTHER ORDER

Date" 19th June, 1998

After the above order was dictated in the open Court, but before the same was signed, learned counsel for the appellant approached us with a request that he should be permitted to correct a statement of fact inadvertently and erroneously made by him during the course of oral submissions. In this context he stated that through error and oversight he had submitted that out of the two criminal proceedings filed by the appellant before the Criminal Court, one of such criminal proceedings has been withdrawn and one remained to be withdrawn on the date when the respondent committed default in payment of the second instalment viz. 14th September, 1997. He now seeks to correct himself and bring on record the correct factual position to the effect that none of the two criminal proceedings had been withdrawn by the appellant on or by the said date. We accept this factual correction orally tendered by learned counsel for the appellant. However, since this correction does not in any manner affect our factual findings nor the conclusions drawn by us, as expressed in the aforesaid order, no further comment on our part is necessary.

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(Y.B.Bhatt,J.)

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(R.P.Dholakia,J.)

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